IN THE HIGH COURT OF HIMACHAL PRADESH SHIMLA

CWP No.1273 of 2006

Reserved on 5.12.2007

Date of decision 24.12.2007

Arvind Kumar Sharma Petitioner

Vs.

Ram Murti and others Respondents

Coram:

The Hon'ble Mr. Justice Rajiv Sharma, Judge.

Whether approved for reporting?[1] Yes.

For the Petitioner: Mr.R.K.Bawa, Senior Advocate, with Mr.Inderjit Singh Narwal, Advocate.

For the respondents: Mr. K.D.Sood and Mr. Rajnit K.Lal, Advocates, for respondent No.1.

Mr.M.S.Chandel, Advocate General with Mr.M.A.Khan, Dy.A.G., for respondent No.2.

Rajiv Sharma, J.

The brief facts necessary for the adjudication of this writ petition are that respondent No.1 had filed a claim petition under Section 33-C(2) of the Industrial Disputes Act, 1947 before the Industrial Tribunal-cum-Labour Court, Shimla on 8.5.2001. The respondent No.1 had claimed a sum of Rs.80646.00 from the petitioner for working on daily wage basis with effect from 2.3.1998 to 7.4.2000. The petitioner filed a detailed reply to the claim petition filed by the respondent No.1. The Executive Engineer, HP PWD Division No.1, Bilaspur, H.P. also filed a separate reply to the claim filed by respondent No.1. The respondent No.1 filed rejoinders to the

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[1] Whether reporters of local papers are allowed to see the judgment? Yes.

replies filed by the petitioner and respondent No.2. The petitioner had denied that any amount was payable to respondent No.1. Similarly the respondent No.2 had denied the averments contained in the claim petition.

The petitioner was proceeded against ex parte by the Industrial Tribunal-cum-Labour Court, Shimla on 9.10.2002. The order dated 9.10.2002 reads thus:

> "Case called twice, but none has appeared on behalf of respondent No.1. It is already 10.50 a.m. Accordingly, respondent No.1 is proceeded against ex-parte. Petitioner's ex-parte evidence is neither present nor summoned. Adjournment prayed, which is allowed. Now to come up for ex-parte evidence on 7.3.2003."

The petitioner preferred an application dated 28.8.2003 bearing No.Misc.App.54/2003 under Order 9 Rule 7 read with Section 151 CPC for setting aside the order dated 9.10.2002. It appears from the record that no orders were passed on the application filed under Order 9 Rule 7 CPC by the petitioner. The Labour Court-cum-Industrial Tribunal passed an award against the petitioner on 16.10.2004. The petitioner approached this Court by way of CWP No.207 of 2005 assailing order dated 16.10.2004. CWP No.207 of 2005 was allowed by this Court on 7.11.2005 and the award dated 16.10.2004 was quashed and set aside and the matter was remitted back to the Labour Court. The Labour Court passed an order on 2.9.2006, whereby the application preferred by the petitioner under Order 9 Rule 7 read with Section 151 CPC was dismissed and the matter was directed to be listed for settlement/mediation on 21.9.2006.

Mr.R.K.Bawa, learned Senior Advocate assisted by Mr.Inderjit Singh Narwal, appearing for the petitioner had strenuously argued that the order/award passed by the Labour Court-cum-Industrial tribunal dated 2.9.2006 is not sustainable in the eyes of law. The State has not filed any reply to the writ petition. Mr.K.D.Sood, learned counsel appearing for respondent No.1 had supported the order/award dated 2.9.2006.

I have heard the earned counsel for the parties and also perused the record carefully.

The claim petition was filed under Section 33-C(2) of the Industrial Disputes Act, 1947 on 8.5.2001. The petitioner and the respondent No.2 have filed replies to the claim petition to which rejoinders were also filed by the respondent No.1. The petitioner was proceeded against ex-parte on 9.10.2002. He filed application under Order 9 Rule 7 CPC on 28.8.2003. The reasons assigned in the application seeking setting aside of the ex parte order dated 9.10.2002 were that the petitioner was out of India and immediately when he came to know about the ex parte order he moved the application at the earliest. The application was contested by the respondent No.1. The petitioner had appeared as PW-1 before the Labour Court. He has also filed affidavit i.e. Ex.R/A supporting his version. He had testified before the labour Court that he was living abroad and was not physically fit and had also produced medical certificates to this effect. Petitioner's father Sh. Yogender Lal Sharma had appeared as PW-2 and had also filed his affidavit Ex.RB. He had corroborated the statement of PW-1. It appears from the award that the respondent No.1 has not led any evidence.

It will also be pertinent to refer to orders passed by the Labour Court after 9.10.2002. The first order was passed by the Labour Court on 7.3.2003 followed by orders dated 27.5.2003, 11.7.2003, 27.8.2003, 14.11.2003 and 2.3.2004. On 2.3.2004 the petitioner through his General Power of Attorney Sh.Yogender Lal Sharma was permitted to join further proceedings and the matter was adjourned for settlement to 26.4.2004. The parties were directed to appear in person. The matter was thereafter taken up on 26.4.2004 on which date following order was passed:

"To come up for arguments on 19.7.2004."

Thereafter the matter came up before the Labour Court on 19.7.2004, 16.8.2004, 10.9.2004 and 16.10.2004 on which date the petition was allowed.

The petitioner was proceeded against ex-parte on 9.10.2002. As per his statement he was out of India and when he came to know on 16.8.2003 about the ex parte order he filed an application under Order 9 Rule 7 on 28.8.2003. The reasons assigned in the application were cogent and sufficient to set aside the ex-parte order dated 9.10.2002 coupled with the statement of PW-2 and his affidavit Ex.RB. The Labour Court has not assigned any reason why the version of the petitioner and PW-2 has not been believed. The respondent No.1 has not led any evidence except filing of reply to the application preferred under Order 9 Rule 7 CPC by the petitioner. The Labour Court has also come to a wrong conclusion that the order dated 26.4.2004 was required to be set aside. Once the application under Order 9 Rule 7 CPC had been preferred by the petitioner for seeking setting aside the order dated 9.10.2002 he was not required to assail orders passed subsequently more particularly order dated 26.4.2004. Even on 2.3.2004 the petitioner has been permitted to join further proceedings through his general power of attorney. The petitioner has been proceeded against ex parte only on 9.10.2002 when a specific order was passed and the finding recorded by the Labour Court that the petitioner was again proceeded ex parte on 26.4.2004 is not correct.

The matter can be looked into from another angle. The petitioner had filed reply to the claim petition on 16.7.2001 and issues were also framed in the presence of his counsel on 25.7.2002. The petitioner has been proceeded against ex-parte at 10.50 a.m. though the Labour Court should have awaited at least up to lunch break before passing the order dated 9.10.2002. The Labour Court has only passed a very innocuous

order dated 26.4.2004. The petitioner was required to be permitted to join the proceedings in the interest of justice. The Labour Court has adopted a very rigid attitude while dealing with the application under Order 9 Rule 7 CPC. In the proceedings before the Labour Court only the principles of Code of Civil Procedure are applicable and the same are to be applied liberally. The petitioner could participate in the proceedings even after filing application under Order 9 Rule 7 CPC except that he could not be relegated to the position as existed on 9.10.2002.

In case **Sangram Singh v. Election Tribunal, Kotah and another**, AIR 1955 SC 425 the Hon'ble Supreme Court has held that the Code of Civil Procedure is designed to facilitate justice and further its ends; not a penal enactment for punishment and penalties; not a thing designed to trip people up. Their Lordships of the Supreme Court while interpreting Order 9 Rule 7 CPC has held that Rule 7 provides that if at an adjourned hearing the defendant appears and shows good cause for his "previous non-appearance" he can be heard in answer to the suit "as if he had appeared on the day fixed for his appearance" and this cannot be read to mean that he cannot be allowed to appear at all if he does not show good cause. All it means is that he cannot be relegated to the position he would have occupied if he had appeared. . If a party does appear on "the day to which the hearing of the suit is adjourned", he cannot be stopped from participating in the proceedings simple because he did not appear on the first or some other hearing.

Their Lordships have held as under:

> Now a code of procedure must be regarded as such. It is procedure, something designed to facilitate justice and further its ends: not a penal enactment for punishment and penalties; not a thing designed to trip people up. Too technical a construction of sections that leaves no room for reasonable elasticity of interpretation should therefore be guarded against (provided always

that justice is done to both sides) lest the very means designed for the furtherance of justice be used to frustrate it.

Next, there must be ever present to the mind the fact that our laws of procedure are grounded on a principle of natural justice which requires that men should not be condemned unheard, that decisions should not be reached behind their backs, that proceedings that affect their lives and property should not continue in their absence and that they should not be precluded from participating in them. Of course, there must be exceptions and where they are clearly defined they must be given effect to. But taken by and large, and subject to that proviso, our laws of procedure should be construed, wherever that is reasonably possible, in the light of that principle.

Then comes rule 7 which provides that if at an adjourned hearing the defendant appears and shows good cause for his "previous non-appearance", he can be heard in answer to the suit

"as if he had appeared on the day fixed for his appearance".

This cannot be read to mean, as it has been by some learned Judges, that he cannot be allowed to appear at all if he does not show good cause. All it means is that he cannot be relegated to the position he would have occupied if he had appeared,

Now rule 2 only applies when one or both of the parties do not appear on the day fixed far the adjourned hearing. In that event, the Court is thrown back to Order IX with the additional power to make "such order as it thinks fit". When it goes back to Order IX it finds that it is again empowered to proceed ex parte on the adjourned hearing in the same way as it did, or could have done, if one or other of the parties had not appeared at the first hearing, that is to say, the right to proceed ex parte is a right which accrues from day to day because at each adjourned hearing the Court is thrown back to Order IX, rule 6.

It is not a mortgaging of the future but only applies to the particular hearing at which a party was afforded the chance to appear and did not avail himself of it. Therefore, if a party does appear on "the day to which the hearing of the suit is adjourned", he cannot be stopped from participating in the proceedings simply because he did not appear on the first or some other hearing."

Similarly, their Lordships of the Supreme Court while interpreting the true import of Order 9 Rule 7 have held in **Arjun Singh v. Mohindra Kumar and others**, AIR 1964 SC 993 as under:

> "The entirety of the evidence of the plaintiff might not be concluded on the hearing day on which the defendant is absent and something might remain so far as the trial of the suit is concerned for which purpose there might be a hearing on an adjourned date. On the terms of O IX R.7 if the defendant appears on such adjourned date and satisfies the court by showing good cause for his non-appearance on the previous day or days he might have the earlier proceedings recalled—" set the clock back" and have the suit heard in his presence. On the other hand, he might fail in showing good cause. Even in such a case he is not penalized in the sense of being forbidden to take part in the further proceedings of the suit or whatever might still remain of the trial, only he cannot claim to be relegated to the position that he occupied at the commencement of the trial. Thus every contingency which is likely to happen in the trial vis-à-vis the non appearance of the defendant at the hearing of a suit has been provided for and O. IX R.7 and O. IX R. 13 between them exhaust the whole gamut of situations that might arise during the course of the trial"….

The petitioner has shown sufficient cause for not appearing on 9.10.2002. Similarly there is no period of limitation prescribed for filing application under Order IX Rule 7 CPC. The application could be filed within a period of three years as per Article 137 of the Limitation Act.

The Delhi High Court has held in **Delhi Development Authority v. Shanti Devi and another**, AIR 1982 Delhi 159 as under:

> "Under the Limitation Act no period is prescribed for filing an application for setting aside the order proceeding ex parte. Under R. 7 of O. 9 of the Code the defendant is allowed to file an application at or before the next date of hearing and if he assigns good cause for his non appearance on the previous date of hearing the court may set aside the order proceeding ex parte. The

application by the petitioner-defendant under O.9, R.7 was made on the next date of hearing i.e. 16th Aug., 1979. Thus it is clear that the defendant – petitioner filed the application in accordance with O. 9 R. 7 of the Code. It must therefore be held that the application was filed in accordance with law. There is no rule that an application under O. 9 R.7 is to be filed within 30 days from the date of the order proceeding ex parte. The next question is whether there was good cause for the absence of the petitioner-defendant on 30th Apr., 1979 before the trial Court. Counsel for the D.D.A. Mr. K.P.Sharma filed his own affidavit that on 30th Apr., 1979 he was busy in his personal matter and therefore he could not attend the Court at the time when the suit was called by the Court. He further states that he reached the Court at 10.55 a.m. and came to know that he ex parte proceedings have been ordered against the petitioner-defendant. There is good cause for the absence of the counsel on 30.4.1979. The order dated 30th Apr., 1979 proceeding ex parte against the petitioner defendant is therefore set aside and the petitioner-defendant is allowed to appear and contest the suit."…

For the foregoing reasons the petition is allowed. Consequently, the order dated 9.10.2002 and 2.9.2006 are quashed and set aside. The petitioner is permitted to cross examine the witnesses of the claimant and produce his evidence in the case. The parties through their counsel are directed to appear before the Labour Court-cum-Industrial Tribunal at Dharamshala on 15.1.2008. The Labour Court-cum-Industrial Tribunal shall make an endeavour to dispose of the petition within three months.

All the pending applications, if any, shall also stand disposed of.

No order as to costs.

December 24, 2007 (g) **(Rajiv Sharma), J.**